STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 19, 2007
v	No. 267114 Genesee Circuit Court
CEDRIC MONTEZ SMITH, Defendant-Appellant.	LC No. 05-016414-FC

Before: Meter, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of larceny from a motor vehicle, MCL 750.356a, armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, discharging a weapon from a motor vehicle, 750.234a, carrying a concealed weapon (CCW), 750.227, two counts of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), 750.227b. He was sentenced as a fourth-offense habitual offender, MCL 769.12, to serve concurrent prison terms of four to fifteen years for larceny from a motor vehicle, ten to twenty-five years for armed robbery, and four to fifteen years for felon in possession of a firearm, discharging a weapon from a motor vehicle, CCW, and each count of felonious assault. Defendant was also sentenced to a consecutive two-year term for felony-firearm. We affirm. This case is being decided without oral argument under MCR 7.214(E).

This prosecution stems from a May 28, 2005, incident that began outside the Genesee Valley Mall and ended after a vehicle chase during which gunshots were fired. Brandon Reeves testified that as he and three other persons – Berry Valentine, Marlon Austin, and Jonathan Donald – exited the mall, he noticed Jarvelle Thames kneeling next to Thames's car, which was parked next to Reeves's car. Reeves then noticed that his compact disc (CD) player was missing from his car. Thames admitted at trial to taking the CD player. Thereafter, Thames and his two companions – Deantwan Sturgess and defendant – fled the scene in Thames's car. Reeves and his companions gave chase in Reeves's car. During the chase, gunshots were fired from Thames's car. Thames and Sturgess eventually entered pleas in juvenile court to larceny from a vehicle.

Defendant first argues that insufficient evidence was adduced at trial to support his armed robbery and larceny from a vehicle convictions. We disagree. The elements necessary to prove armed robbery are: "(1) an assault, (2) a felonious taking of property from the victim's presence

or person, (3) while the defendant is armed with a weapon described in the statute." *People v Ford*, 262 Mich App 443, 458; 687 NW2d 119 (2004) (internal quotation marks omitted; citations omitted). The elements of larceny from a vehicle are: (1) "that the defendant took a . . . radio . . . stereo . . . [or] electronic device"; (2) "that the property was taken without consent"; (3) "that when [the property] was taken, the property was in . . . a motor vehicle"; (4) "that there was some movement of the property"; and (5) "that at the time the property was taken, the defendant intended to permanently deprive the owner of the property." See CJI2d 23.5. Defendant was charged alternatively as a principal or on an aiding and abetting theory. To convict under an aiding and abetting theory, the prosecution must prove the following:

> "(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement." [*People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004), quoting *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999) (alteration by *Moore*).]

In resolving a sufficiency challenge, the Court should not intrude on the jury's authority to determine the weight of evidence and assess the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992). A prosecutor "need not negate every reasonable theory" of innocence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Further, an actor's state of mind may be inferred from circumstantial evidence. *People v Grayer*, 235 Mich App 737, 743; 599 NW2d 527 (1999).

MCL 750.529, the armed robbery statute, was amended, effective July 1, 2004, to read as follows:

> A person who engages in conduct proscribed under section 530 and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while violating this section, the person shall be sentenced to a minimum term of imprisonment of not less than 2 years.

MCL 750.530 was amended, effective July 1, 2004, to read as follows:

> (1) A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.
>
> (2) As used in this section, "in the course of committing a larceny" includes acts that occur in an attempt to commit the larceny, or during

commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.

Under the clear language of the statutes effective at the time the crimes in issue were committed, a defendant can be found guilty of armed robbery if the defendant was armed with a dangerous weapon and committed an assault "in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property." MCL 750.530(2). See *People v Morson*, 471 Mich 248, 264-265; 685 NW2d 203 (2004) (Corrigan, C.J., concurring).

Reeves and his companions apparently came upon defendant and his companions shortly after the CD player was taken from Reeves's car. Reeves did not consent to the taking of the CD player. When confronted by Reeves, Thames drove off, with defendant in the rear passenger side seat. While Thames testified at trial that he took the CD player without telling defendant he was going to do so, he admitted to telling the police that defendant told him to take it. The stolen CD player was found on the floor of the car's rear passenger side. Reeves, Valentine, and Austin testified that defendant fired a gun at them from his backseat position during the chase following the robbery. Although he could not identify defendant at trial, Donald also testified that the shots came from this same location. A 32-caliber cartridge and cartridge holder were found by police in the area where defendant was seated. In our opinion, this evidence and the reasonable inferences arising therefrom were sufficient to support defendant's convictions both of armed robbery and of larceny from a vehicle as either a principal or on an aiding and abetting theory.

We also reject defendant's argument that the prosecutor violated the rule of *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), in excluding a potential juror from the panel that was eventually sworn. In examining the constitutionality of a peremptory challenge the following three-factor test is applied:

> First, the opponent of the peremptory challenge must make a prima facie showing of discrimination. To establish a prima facie case of discrimination based on race, the opponent must show that: (1) he is a member of a cognizable racial group; (2) the proponent has exercised a peremptory challenge to exclude a member of a certain racial group from the jury pool; and (3) all the relevant circumstances raise an inference that the proponent of the challenge excluded the prospective juror on the basis of race. . . .
>
> Second, if the trial court determines that a prima facie showing has been made, the burden shifts to the proponent of the peremptory challenge to articulate a race-neutral explanation for the strike. *Batson*'s second step "does not demand an explanation that is persuasive, or even plausible." Rather, the issue is whether the proponent's explanation is facially valid as a matter of law. "A neutral explanation . . . means an explanation based on something other than the race of the juror. . . . Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." [*People v Knight*, 473 Mich 324, 336-337; 701 NW2d 715 (2005) (citations omitted).]

"The neutral explanation must be related to the particular case being tried and must provide more than a general assertion in order to rebut the prima facie showing." *People v Bell*, 473 Mich 275, 283; 702 NW2d 128, amended on other grounds 474 Mich

1201 (2005) (lead opinion of Corrigan, J., joined by Young and Markman, JJ.), 300 (Weaver, J., joining relevant part of lead opinion).

> Finally, if the proponent provides a race-neutral explanation as a matter of law, the trial court must then determine whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination. It must be noted, however, that if the proponent of the challenge offers a race-neutral explanation and the trial court rules on the ultimate question of purposeful discrimination, the first *Batson* step (whether the opponent of the challenge made a prima facie showing) becomes moot. [*Knight*, *supra* at 337-338 (citations omitted).]

After defense counsel raised his concern, the court allowed the prosecutor to articulate a race-neutral explanation for the challenge, which the court credited. The prosecutor's race-neutral explanation was as follows:

> The Court had inquired, your Honor, if it recalls about anyone who would've been upset with the police in the past, who were victims of crime, who did not have anything—nothing was done in result of arrest or prosecution and whether or not they were upset by that. Two people raised their hands. One was Mr. Melton . . . . The other was Mr. Cheney . . . .
>
> When the Court pressed Mr. Cheney he said he wasn't sure. He would try but he wasn't sure whether he could set aside the fact that he was upset with police in the past because of that event, the event being a breaking and entering.
>
> Mr. Melton went on to give some answers with regard to, number one, he had sat on a murder jury before and came back with a guilty verdict. Also he said he found it hard—that if a defendant did not testify, he would have—weigh that in his deliberations. I was comfortable with Mr. Melton.
>
> However, because Mr. Cheney had indicated he is upset with police and wasn't sure he could set that aside, and after consulting with my officer in charge, we . . . felt convinced that Mr. Cheney should be removed.
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> The record should also reflect that there are three other African-American jurors who are on this jury that I did not make any challenges towards. It is not any issue involving race that was in my thought process but by the fact that this particular juror said he was upset with police and might not be able to set that aside.

The court responded, "Well, the Court finds there's a racially neutral reason for the prosecutor to have exercised the peremptory." Because the court addressed the ultimate question, the first step of the three-step analysis is moot. *Knight*, *supra* at 338.

The prosecutor's explanation is facially race-neutral and therefore valid. *Id.* at 337. It is utterly unrelated to the prospective juror's race. Rather, it is tailored to the specific responses

Cheney offered to questions raised by the court – namely, that Cheney indicated that his irritation with the police over not arresting the person(s) who broke into his home "might" influence his attitude as a juror. When specifically asked whether his "ability to be a fair and impartial juror" would be impacted, Cheney answered, "To tell you the truth, I don't know." "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez v New York*, 500 US 352, 360; 111 S Ct 1859; 114 L Ed 2d 395 (1991). The prosecutor's explanation satisfies equal protection guarantees as a matter of law.

Defendant seems to imply in his brief on appeal that the prosecutor's articulated race-neutral reason was a pretext. In support, he attempts to draw a distinction between the prosecutor's handling of a Caucasian juror named Melton[1] and juror Cheney. In essence, defendant is arguing that because Melton should have been challenged, defendant's explanation of why Cheney was challenged is pretextual. This is a non sequitur, i.e., it does not follow that because one Caucasian juror was not challenged, the articulated race-neutral reason for the challenge of the African-American juror was pretextual.

Further, the implication that Melton should have been challenged by the prosecutor is at odds with the factual record. It is true that Melton had expressed dissatisfaction with the police's handling of the theft of his lawn tractor. However, unlike Cheney, when asked if his irritation with the police would carry over into the case at hand, Melton responded with an unequivocal "No." As for defendant's assertion that Melton had sat on a jury that found a defendant guilty of murder, there is nothing about this experience that in any way undermines the explanation given regarding Cheney. When asked if his prior jury experience would affect his ability to be fair and impartial, Melton again answered "No." Additionally, when Melton explained that he would be suspicious of a non-testifying defendant, the court immediately instructed the jury pool that they "should not hold it against the defendant in any way if he chooses not to testify." Accordingly, no clear error has been established and defendant's *Batson* challenge fails.

Affirmed.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood

[1] We note that defendant used one of his peremptory challenges to excuse Melton.